

## STATE OF MONTANA

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The notice of appeal to the County Superintendent is dated June 29, 1998. It states seven claims against the Billings District and thirteen claims against the Blue Creek District. The record is unclear as to when the notice was filed and when, if ever, Ms. Swecker served the Districts. Because motions to dismiss are viewed in the light most favorable to the opposing party, this State Superintendent shall use June 29, 1998, as the date of the appeal to the County Superintendent for purposes of this review.

Ms. Swecker disqualified the Yellowstone County Superintendent. The Yellowstone County Superintendent appointed the Gallatin County Superintendent (hereinafter the "Acting County Superintendent") to hear the appeal. By letter dated October 9, 1998, Ms. Swecker's attorney requested that the two appeals be consolidated and the matter be set for hearing. The Acting County Superintendent declined to consolidate the appeals because they stated different claims against different school districts. On October 28, 1998, she issued an Order giving the District notice of the appeal.

The Billings District filed a motion to dismiss with a supporting affidavit and brief. Ms. Swecker filed a document captioned "Reply Brief on Respondent's Motion to Dismiss" and the District filed a reply. On April 8, 1999, the Acting County Superintendent issued a Decision and Order granting the Billings District's motion to dismiss for all claims.

On May 12, 1999, the Office of Public Instruction (hereinafter "OPI") received a document captioned "Amended Notice of Appeal." Although captioned "amended" it is the only notice of appeal OPI received. Attached to the "Amended Notice" was a certificate of mailing dated May 11, 1999. OPI issued a Notice establishing a briefing schedule.

Ms. Swecker's initial brief on appeal was due July 8, 1999, but she chose not to file a brief. Her attorney submitted a document captioned "Notice of Filed Brief" stating that:

Petitioners/Appellants, by and through their co-counsel, Lee Rindal, hereby give notice that their briefs were submitted concurrently with and within their Appeal previously submitted to the Office of Public Instruction and all parties and/or their counsel of record. Petitioners/Appellants incorporate the same by reference herein.

No brief was received. The Billings District filed a brief.

This State Superintendent, having reviewed the record below, including briefs, affidavits and supporting documents, the "Amended Notice of Appeal" and the briefs of the Billings District, issues the following Order.

### **DECISION AND ORDER**

The April 8, 1999, Decision and Order of Dismissal of the Acting Yellowstone County Superintendent is AFFIRMED.

### **STANDARD OF REVIEW**

The State Superintendent's review of a county superintendent's decision is based on the standard of review of administrative decisions established by the Montana Legislature in § 2-4-704, MCA, and adopted by the State Superintendent in ARM 10.6.125. Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed to determine if the correct standard of law was applied. See, for example, Harris v. Trustees, Cascade County School Districts No. 6 and F, and Nancy Keenan, 241 Mont. 274, 786 P.2d 1164 (1990) and Steer, Inc. v. Dept. of Revenue, 245 Mont. 470, at 474, 803 P.2d at 603 (1990).

Granting a motion to dismiss based on lack of jurisdiction is a conclusion of law. On review, this State Superintendent uses the standard that motions to dismiss are viewed with disfavor and are considered from the perspective most favorable to the opposing party. Buttrell v. McBride Land and Livestock, 170 Mont. 296, 553 P.2d 407 (1976). Bland v. Libby School District No. 4, OSPI 205-92, 12 Ed.Law 76 (June, 1993).

### **MEMORANDUM OPINION**

## **Summary of Facts.**

As stated above, while the claims against the Billings District and the Blue Creek District are different, the disputes that gave rise to the appeals are related. The Districts' motions to dismiss included affidavits and supporting documents. The facts reiterated here are established by the following:

- 1) the Acting County Superintendent's dockets;
- 2) the affidavits of the Billings District Business Manager (Dick Reich - affidavit found in County Superintendent Docket of [H] v. Billings School District No. 2) and the Blue Creek District Principal (Nancy Nettik - affidavit found in County Superintendent Docket of [H] v. Blue Creek School District No. 3);
- 3) the FP-14 (Student Attendance Agreement - found in County Superintendent Docket of [H] v. Blue Creek School District No. 3, Reich affidavit, Attachment B) signed by Ms. Swecker;
- 4) the minutes of the Blue Creek District Trustees May 14, 1998, meeting (Swecker v. School District No. 3, Blue Creek, OSPI 278-99, Respondent Brief, Attachment B); and
- 5) the procedural record In the Matter of L.H. (OSPI 97-10, mediated September 4, 1997, closed December 4, 1997, an IDEA due process proceeding before the State Superintendent of Public Instruction brought by Ms. Swecker against the Blue Creek District in 1997).

On April 18, 1997, Ms. Swecker withdrew L.H. and R.H. from elementary school in the Blue Creek District (Nettik Affidavit, paragraph 2). L.H., a student eligible for special education services, has certain educational rights and procedural protections in addition to those afforded all Montana students. One of those rights is the right to a due process hearing before an impartial hearing officer on issues related to identification, evaluation, educational placement and the provision of a free appropriate public education (hereinafter "FAPE"). On June 3, 1997, Ms. Swecker filed a request for an IDEA due process hearing regarding L.H.'s educational

placement and the provision of FAPE. Although a Blue Creek District resident, Ms. Swecker wanted L.H. placed in the Billings District.<sup>1</sup>

OPI notified the Blue Creek District and appointed an impartial hearing examiner who, at the request of the parties, acted as mediator (Docket, OSPI 97-10). On September 4, 1997, a mediation conference was held. Ms. Swecker was present along with a number of representatives including her attorney. The Blue Creek District was represented by its principal and its attorney.

The Report of Mediation Conference states that the participants reached tentative agreement regarding L.H.'s enrollment in Blue Creek. Ms. Swecker's attorney agreed to prepare a preliminary draft. No draft is found in the record. However, in October 1997, L.H. was enrolled in the Billings District pursuant to an agreement between the Blue Creek District, the Billings District and Ms. Swecker that the Billings District was the appropriate special education placement.

In accordance with the Billings District's practice regarding out-of-district students eligible for special education services, L.H. was enrolled subject to the agreement that the district of residence (Blue Creek) pays tuition (Reich affidavit, paragraph 3).

According to the Reich affidavit and Ms. Swecker's appeal, sometime in the Fall of 1997 Ms. Swecker purportedly transferred the guardianship of R.H. to Heather Swecker in a proceeding in District Court. As a matter of state law, however, (discussed below) and as stated by their mother on a Form FP-14 (Application for out-of-district attendance, Reich affidavit,

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<sup>1</sup> Section 20-7-421, MCA, provides that if the individualized education program ("IEP") team determines it is appropriate, the trustees may arrange for attendance and related services in another Montana district. Tuition and transportation as required under 20-5-323, MCA, may be charged as provided in 20-7-420, MCA.

Attachment B), L.H. and R.H. are residents of the Blue Creek District. They are, therefore, out-of-district students enrolled in the Billings District.

On October 27, 1997, the Billings District, acting through its attorney, sent written notice that the Billings District required tuition for out-of-district students enrolled in the District (Reich affidavit, Attachment A). The letter explained that Blue Creek District was responsible for L.H.'s tuition because he was a student eligible for special education services and the Districts agreed his appropriate placement for FAPE was in the Billings District. The letter explained that R.H. could enroll as an out-of-district resident, that the guardianship proceedings did not change R.H.'s legal residence for school purposes and that the parents would be responsible for the tuition. The letter also cited Ms. Swecker's attorney to the procedural statutes governing tuition.

On December 4, 1997, the proceeding In The Matter of L.H. was closed. The Order references the following statement by Ms. Swecker's advocacy group representative:

As of November 24, 1997 [L.H. and R.H.] are in school at last!! The Billings Public School District through its attorney, Larry Martin, informed Ms. Rapp [Ms. Swecker] that both [L] and [R] could attend Newman School. Newman School is the school that the boys used to attend before they moved into the Blue Creek School District. It is also the school that Ms. Rapp [Ms. Swecker] requested six months ago and was told repeatedly that Newman was too crowded to accept two new second graders. Deanne [Ms. Swecker] is ecstatic about the placement at Newman and the boys are very pleased. Ms. Rapp [Ms. Swecker] will probably pursue an appeal of the tuition charges for [R], but no matter how the appeal plays out, the boys will stay at Newman. At this point, it appears that the due process proceedings can be concluded since [L.H.] is in an appropriate school setting where he can receive the special education to which he is entitled.

Ms. Swecker's advocate stated that the due process proceeding could be closed. Her statements also show that the Billings District had notified Ms. Swecker's advocate of its tuition decision and the appeal process for tuition disputes by at least December 4, 1997.

The Billings District allowed Ms. Swecker to offset a portion of the tuition charge with

Heather Swecker's prior year tax bill attributable to elementary mills. On February 5, 1998, the Billings District sent Ms. Swecker notice of its calculation of this amount (Reich affidavit, Attachment C).

There is no record of an FP-14 being submitted to Blue Creek District. However, Nancy Nettik's affidavit states that the district received a request from Ms. Swecker that it pay tuition to the Billings School District for R.H. R.H. is not an IDEA-qualified student but Ms. Swecker wanted to enroll him out-of-district. A Blue Creek District Board of Trustees meeting was held on May 14, 1998, and it is a matter of public record that the Trustees denied the tuition request (Swecker v. School District No. 3, Blue Creek, OSPI 278-99, Respondent Brief, Attachment B). On June 29, 1998, Ms. Swecker filed her appeal with the County Superintendent.

### **Issues Raised on Appeal.**

Billings District's Procedural Issue. The Billings District raised the issue that the appeal to this State Superintendent was not timely because it was filed more than 30 days after the Acting County Superintendent's Order. The Acting County Superintendent's Order was dated April 8, 1999. The notice of appeal is dated May 11, 1999, and was received in this office on May 12, 1999. Allowing three additional days for mailing the May 11, 1999, appeal is timely.

Petitioner/Appellant's Issues. Ms. Swecker listed seven issues in her Amended Notice of Appeal. These appear to be the same issues she raised before the Acting County Superintendent. She also reiterated at least two issues that she raised in her Blue Creek appeal. The issues on appeal are paraphrased as follows:

1. Did the Acting County Superintendent, relying on the affidavit of the Billings District Business manager, incorrectly dismiss the appeal without a hearing?
2. Did the Acting County Superintendent's failure to include attachments with the copy of her Order adversely affect Ms. Swecker's right? .

3. Did the process followed by the Acting County Superintendent violate L.H.'s IDEA procedural or substantive rights?
4. Did the Billings District erroneously refuse to enroll R.H. or erroneously charge tuition for R.H. as an out-of-district resident?
5. Did the Billings District erroneously calculate the tuition due?
6. Did the Billings District fail to provide compensatory education?
7. Did the Billings District Trustees facilitate "wrongful conduct" by the Blue Creek School District?

Issues one through three are identical to the issues raised in Swecker v. School District No. 3, Blue Creek, OSPI 278-99. That discussion is incorporated into this order. The Acting County Superintendent correctly dismissed all the claims in Ms. Swecker's appeal because the appeal was filed more than 30 days after any decision made by the Billings District Trustees. On October 27, 1997, the Billings District, acting through its attorney, sent Ms. Swecker's attorney written notice of how the Billings District policy to require tuition for out-of-district students would be applied (Reich affidavit, Attachment A). The letter also explained the appeal process. The June 29, 1998, appeal to the County Superintendent was filed more than 30 days after any decision of the Billings District Trustees.

Because the Acting County Superintendent correctly dismissed the appeals as untimely, there was no need for her to address the merits of Ms. Swecker's appeal. This Order will briefly address the merits of issues four through seven because the tuition issue re-occurs every year in other situations.

Issues Four and Five. Since the Billings District enrolled both R.H. and L.H., the claim that the District refused to enroll them does not make sense. If the issue being raised is that they were not assigned to the school building of their choice, that is not an appealable decision.

School boards have the authority to define boundaries for schools within a district and can assign



out-of-district students to a school within the district.

The Billings District also could charge Ms. Swecker tuition for R.H. and correctly calculated the amount due. Montana's public school system provides for free, public education to students between the ages of 5 and 18 in the student's district of residence. Section 20-5-101, MCA. Montana is not an open enrollment state. This means a student does not have a statutory right to enroll in any public school in Montana. A student has the right to enroll in the district where his or her parents reside. Enrolling out-of-district students is a matter of trustee discretion, subject to the requirements of Title 20, Chapter 5, Part 3.

The residence of a child is determined according to § 1-1-215, MCA. Section 20-5-322(1), MCA, states: "(1) In considering an out-of-district attendance agreement, the trustees shall determine the child's district of residence on the basis of the provisions of 1-1-215."

Section 1-1-215, MCA, states:

Every person has, in law, a residence. In determining the place of residence, the following rules are to be observed

(1) It is the place where a person remains when not called elsewhere for labor or other special or temporary purpose and to which the person returns in seasons of repose.

(2) There may only be one residence. If a person claims a residence within Montana for any purpose, then that location is the person's residence for all purposes unless there is a specific statutory exception.

(3) A residence cannot be lost until another is gained.

(4) The residence of a minor's parents or, if one of them is deceased or they do not share the same residence, the residence of the parent having legal custody or, if neither parent has legal custody, the residence of the parent with whom the minor customarily resides is the residence of the unmarried minor. In case of a controversy, the district court may declare which parental residence is the residence of an unmarried minor.

(5) The residence of an unmarried minor who has a parent living cannot be changed by either the minor's own act or that of the minor's guardian.

(6) The residence can be changed only by the union of act and intent.  
(Emphasis added)

If an out-of-district student does not meet the mandatory enrollment criteria stated in § 20-5-321, MCA, (which require the district of residence to pay tuition in most cases) he or she can only enroll out of district if the trustees of the district of choice have adopted an open enrollment policy. Section 20-5-320(1), MCA. Allowing enrollment does not mean the student may attend without tuition. The student's parent or guardian is required to pay tuition unless the trustees have waived tuition for all students. Section 20-5-320(3), MCA.

The statutory scheme of allowing trustees to choose whether to allow out-of-district students to enroll and to charge tuition can result in parental inconvenience, but we must assume that the Montana Legislature weighed that inconvenience against other policy issues such as funding and facilities. School districts are currently funded with both state and local taxes. If a district allows out-of-district students to enroll without a tuition contribution, it is shifting a portion of the education cost from the taxpayers of the district of residence to the taxpayers of the district of attendance.

There is no question that L.H. and R.H. were residents of the Blue Creek District. On the FP-14 (application for out-of-district attendance, Reich affidavit, Attachment B) Ms. Swecker stated that Blue Creek was her district of residence. While it is unclear to this State Superintendent what legal relationship was created with the proceeding in District Court regarding Heather Swecker, for purposes of this Order it is assumed she is now the children's guardian. However, under state statute, that fact does not change the children's legal residence. See § 1-1-215(5), MCA.

The Billings District correctly calculated the tuition. It allowed a credit for the portion of elementary school district taxes paid by Heather Swecker. This is provided for in statute. Section 20-5-320(9), MCA, states:

A provision of this title may not be construed to deny a parent the right to send a child, at personal expense, to any school of a district other than the resident district when the trustees of the district of choice have approved an out-of-district attendance agreement and the parent has agreed to pay the tuition as prescribed by 20-5-323. However, under this subsection (9), the tuition rate must be reduced by the amount the parent or guardian of the child paid in district and county property taxes during the immediately preceding school fiscal year for the benefit and support of the district in which the child will attend school. (Emphasis added.)

In summary, the Billings District followed the statutory requirements concerning out-of-district enrollment and tuition. It approved R.H.'s enrollment but it was not required to waive tuition, and it informed Ms. Swecker that the tuition would not be waived. The Blue Creek District is required to pay L.H.'s tuition because it agreed to the out-of-district placement for IDEA purposes. It is not required to pay R.H.'s tuition because he does not meet the requirements for mandatory approval of out-of-district attendance. Section 20-5-321, MCA.

Issue 6. Failure to provide compensatory education. The Acting County Superintendent correctly dismissed this issue. Compensatory education is a remedy that may be available to a student with disabilities who is eligible for services under IDEA. A county superintendent cannot hear an appeal related to an IDEA issue, however. See § 20-3-211(4), MCA, and discussion in Swecker v. School District No. 3, Blue Creek, OSPI 278-99, Decision and Order.

Issue 7. Did the Billings District Trustees facilitate "wrongful conduct" by the Blue Creek District? The Acting County Superintendent correctly dismissed this issue on appeal. Regardless of whether this claim states a cause of action that could be brought in any forum, it is not an appealable issue to a county superintendent. A county superintendent's jurisdiction is limited to hearing appeals of some decisions of trustees. Section 20-3-210, MCA, provides for appeals and hearings before the county superintendent on "all matters of controversy arising in the county as a result of decisions of the trustees." As discussed in Swecker v. School District No. 3, Blue Creek, OSPI 278-99, Decision and Order, a county superintendent does not have the

jurisdiction to rule on a claim of wrongful conduct.

### **CONCLUSION**

The Acting County Superintendent's Order dismissing claims one through seven is  
AFFIRMED and the District's motion to dismiss is GRANTED.

DATED this 8<sup>th</sup> day of May, 2001.

/s/ LINDA MCCULLOCH

## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Decision and Order to be mailed to:

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